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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DIETRA R. H. MICKS,

Respondent.
_____/

Case Nos. 80,236 and 80,714

TFB File Nos. 87-21613-04C
and 90-00370-04C

INITIAL BRIEF

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PRELIMINARY STATEMENT

All references to the Referee Report will be designated as (RR-).

The Appellant in these proceedings, Deitra R. H. Micks, will be referred to as Respondent in this Brief.

The Appellee will be referred to as TFB.

References to the transcript of the trial hearing will be designated as (T-).

References to exhibits submitted at the final hearing or in supplemental motion will be designated as (Ex.).

STATEMENT OF THE CASE

A. SUPREME COURT CASE NUMBER: 80,236

On April 9, 1992, Respondent tendered a Waiver Of Hearing and Finding by the Fourth Judicial Circuit Grievance Committee "C" as to probable cause for violation of disciplinary rules 1-102 (A) (4), 2-106 (A), 5-104 (A), 7-101 (A)(1), 7-101 (A)(3) and 9-102(B)(3) of the Professional Code of Responsibility of The Florida Bar. (T-11)

On July 30, 1992, The Florida Bar filed a Complaint against Dietra H. Micks coupled with a Request for Admissions in this case. On August 19, 1992, the Chief Justice appointed the Honorable Arthur W. Nichols III, Circuit Judge, Seventh Judicial Circuit, as referee in this matter.

On December 22, 1992, The Florida Bar submitted a Motion to Deem Matters Admitted and Motion for Summary Judgment, pursuant to Rules 1.370(a) and 1.510 of Florida Rules of Civil Procedure, in that, Respondent failed to answer The Florida Bar's Request for Admission within the 45 day time period set forth in the rules. (T-12)

The final hearing was scheduled and held on March 12, 1993, at the Putnam County Courthouse. On March 9, 1993, Respondent filed a Motion to Dismiss alleging laches. (T-4)

On April 7, 1993, the Referee ordered that The Florida Bar's Motion to Deem Matters Admitted and Motion for Summary

Judgment be granted. The Report of Referee was filed on April 7, 1993.

The Report of Referee recommends that Respondent be suspended from the practice of law for a period of 18 months. (RR-25)

On June 11, 1993, The Florida Bar filed its Petition for Review seeking the review of the recommended discipline of the Report of Referee.

B. SUPREME COURT CASE NUMBER: 80,714

On July 20, 1992, Respondent tendered a Waiver of Hearing and Finding by the grievance committee as to probable cause for violation of disciplinary rules 1-102(A)(5), 1-102(A)(6), 6-101(A)(2), 7-101(A)(3), 7-102(A)(1) and 7-102(A)(2) of the Code of Professional Responsibility of The Florida Bar; and Rules 5-101(A), 5-105(B), 5-105(C), 5-107(A)(1), 5-107(A)(2), 6-101(A)(1), 6-101(A)(2), 7-101(A)(2), 7-101(A)(3) and 9-102(B)(1) of the Disciplinary Rules of The Florida Bar. (T-32)

On November 3, 1992, The Florida Bar filed a Complaint against Dietra H. Micks coupled with a Request for Admissions in this case. On November 13, 1992, the Chief Justice appointed the Honorable Arthur W. Nichols III, Circuit Judge, Seventh Judicial Circuit, as referee in this matter.

On December 22, 1992, The Florida Bar submitted a Motion to Deem Matters Admitted and Motion for Summary Judgment

pursuant to Rules 1.370 (a) and 1.510 of Florida Rules of Civil Procedure, in that, Respondent failed to answer The Florida Bar's Request for Admission within the 45 day time period set forth in the rules. (T-12)

The final hearing was scheduled and held on March 12, 1993 at the Putnam County Courthouse. On March 9, 1993, Respondent filed a Motion to Dismiss alleging laches. (T-4)

On April 7, 1993, the Referee ordered that The Florida Bar's Motion to Deem Matters Admitted and Motion for Summary Judgment be granted. The Report of Referee was filed on April 7, 1993.

The Report of Referee recommends that Respondent be suspended from the practice of law for a period of 18 months. (RR-25)

On June 11, 1993, The Florida Bar filed its Petition for Review seeking the review of the recommended discipline of the Report of Referee.

STATEMEMT OF FACTS

A. SUPREME COURT CASE NUMBER: 80,236

The following facts of this case are set forth in the Report of Referee and are not contested by The Florida Bar.

At all times relevant to the facts of this case, Respondent was a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of The Florida Supreme Court.

In or about February 1985, Ms. Lillian V. Bush was contacted by Respondent concerning the foreclosure action against her property located at 5242 Locksley Avenue, Jacksonville, Florida (herein referred to as the Locksley property). (RR-2)

On or about March 1, 1985, Ms. Bush met Respondent in her Jacksonville law office to discuss the foreclosure of the Locksley property and Ms. Bush's financial circumstances. (RR-2)

Ms. Bush informed Respondent that she had very little money, had judgments against the Locksley property, and had defaulted on the two mortgages on the Locksley property. (RR-2)

Respondent held herself out to be a real estate attorney and agreed to represent Ms. Bush in the foreclosure action pending against the Locksley property. (RR-3) Specifically, Respondent informed Ms. Bush that she would assist her by

obtaining funds from a private source to satisfy the bank and halt the foreclosure. (RR-3)

During March 1985, Respondent spoke to Barnett Bank representatives regarding a loan to Ms. Bush for refinancing the Locksley property. (RR-4) The bank indicated that it would not consider refinancing the property to Ms. Bush due to her outstanding mortgages and judgments against this Locksley property. (RR-4)

On or about March 11, 1985, Respondent met with Ms. Bush and told her that she could not obtain the funds needed from a private source, that she would utilize a lending institution to obtain the monies to stop the bank from fore-closing on the Locksley property, and that her attorney's fees would be a flat rate of $4,000 to represent her on the foreclosure matter. (RR-3) Further, on this date, Respondent prepared a warranty deed to be signed by Mr. Shyon Antonio Bush, Ms. Bush's son, as he held ownership and title to the Locksley property. (RR-4) This warranty deed was signed to convey the Locksley property to Respondent. (RR-4) Respondent advised Ms. Bush that this conveyance would enable Respondent to obtain a loan from a lending institution and that this loan would be used to eradicate the debts of the first and second mortgages as well as the judgments against her property. (RR-5) Ms. Bush was represented by Respondent during this meeting and was never informed that she should consult with other counsel regarding this transaction with Respondent.

Respondent also informed Ms. Bush that she would execute an agreement deed which would reconvey the Locksley property back to Ms. Bush. (RR-5)

On or about March 22, 1985, Respondent received $13,000 from her brother and/or other family members. (RR-5) These funds were not recorded in any records, trust or otherwise, kept by Respondent for her business. (RR-14) Respondent used these funds, and not funds received from a bank as Respondent previously stated to Ms. Bush, to reinstate the first mortgage holder; the second mortgage holder; to pay the judgment held by Copytronics; to pay the judgment held by Montgomery Ward; and the 1984 tax judgment. (RR-5) The total amount paid by Respondent for the mortgages and judgments is $10,911.63. (RR-6)

On April 30, 1985, Respondent induced Ms. Bush to sign a Purchase and Sale Agreement which conveyed the property to Respondent. (RR-6) This Agreement reflects a sale price of $39,000 which includes Respondent's $4,000 in attorney's fees as well as a $10,000 fee for other good and valuable consideration conveyed by Respondent to Ms. Bush. (RR-7) This $10,000 fee was never transferred in any form to Ms. Bush. (RR-7) Simultaneously, Respondent induced Ms. Bush to sign an Agreement for Deed as well as a promissory note. (RR-7-8) The Agreement for Deed reflected a sale price of $39,000 and reconveyance of the property to Ms. Bush. (RR-7) This monetary figure of $39,000 is inflated and does not reflect the actual price paid for the property. (RR-9) The promissory

note dictates that Ms. Bush is indebted to Respondent for the sum of $29,000 not $39,000. (RR-8) The details set forth in the note indicate that the interest rate is 15 1/2 percent per annum on the note and that the monthly installment rate of $415.86 due until the balance is paid. (RR-8) Ms. Bush was not advised by Respondent to seek other counsel regarding this business transaction nor was she ever informed that this transaction constituted a conflict of interest with Respondent. (R-8, 11)

Respondent recorded the Purchase and Sale Agreement in the County Court of Duval County conveying the property to herself but failed to record the Agreement for Deed reconveying the property to Ms. Bush. (R-9)

Subsequently, on May 8, 1985, Respondent borrowed $15,000 from Barnett Bank using the Locksley property as collateral to secure the loan. (R-10) Further, Respondent presented the loan officer at Barnett Bank the Purchase and Sale Agreement which inflates the value of the home to obtain the loan. (R-9)

Respondent did not disclose to Barnett Bank that the loan would be utilized for a third party's benefit, i.e., Ms. Bush. (R-9) The $15,000 provided by the bank was used by Respondent to reimburse the monies previously borrowed from her family and to pay to herself four thousand dollars in attorney fees. (R-10)

On May 8, 1985, Respondent sought an additional loan from Barnett Bank in the amount of $56,000. (R-10) Respondent utilized the following three properties as collateral to secure

this personal loan: the Locksley property; property at 5423 Soutel Drive; and 5411 Soutel Drive. (R-10) Respondent did not seek Ms. Bush's permission to use the Locksley property as collateral for Respondent's personal loan. (R-10) Barnett Bank provided Respondent with both the $15,000 and $56,000 loans. (R-10) At no time did Respondent advise Ms. Bush that there was a conflict of interest in entering into a business transaction with a client; nor did she advise her to seek other counsel during this transaction. (R-10-11)

In accord with the provisions set forth in the promissory note and Agreement for Deed, Respondent collected the sum of $415.86 per month beginning May 1, 1985, from Ms. Bush. (R-11) This money, collected by Respondent, was utilized by Respondent to repay the $15,000 loan. (R-11) The Barnett Bank loan payment was monthly installments of $252.79. (R-11) Respondent was also responsible for paying an outstanding loan on the Locksley property in the amount of $117.25 per month. (R-11) The total payment made by Respondent on a monthly basis amounted to $370.40 for the loans. (R-11) In addition, Respondent collected between $30 and $45 per month for consultation fees. (R-12) The collection of these monthly consultation fees was not reflected in the records pertaining to funds, securities and other properties of a client maintained by Respondent. (R-14) Although this money was collected, Ms. Bush did not utilize Respondent for any legal work other than the foreclosure action. (R-12)

Ms. Bush made her $415.86 per month payment to Respondent from May 1, 1985, to April 2, 1986. (R-12) In April 1986, Respondent increased Ms. Bush's monthly payments to $530.86. (R-12) On April 2, 1986, and upon Ms. Bush's failure to pay this amount, Respondent filed and issued to Ms. Bush a "Final Notice to Quit Premises." (R-12)

Although, at the time of this notice, there was not a signed lease agreement between Ms. Bush and Respondent, the notice demanded "payment of rent" in the amount of $1,061.99 or surrender the premises on or before April 8, 1986. (R-12) The notice, prepared by Respondent, refers to Respondent as record owner of the Locksley property and to Ms. Bush as a month to month tenant. (RR-12-13) This type of landlord/tenant arrangement was not the original agreement between Respondent and Ms. Bush. (RR-13)

Ms. Bush believed that Respondent had filed the Agreement for Deed. (RR-13) Respondent never informed her otherwise. Since the Agreement for Deed conveying the Locksley property to Ms. Bush was never filed, Respondent was the recorded title holder. (RR-13)

On or about May 9, 1986, Ms. Bush forwarded certified funds in the amount of $1,200 to Respondent pursuant to the notice of April 2, 1986. (RR-13) Respondent did not cease and discontinue the eviction of her client, Ms. Bush, but instead indicated that she would "tentatively hold it pending receipt of an additional $415.86." (RR-13)

Contrary to this representation, Respondent deposited the $1,200 sent to her on May 9, 1986, and proceeded with the eviction proceedings. (RR-14) On May 28, 1986, Ms. Bush was served with a Final Judgment of Eviction and Writ of Possession. (RR-14)

Respondent failed to completely maintain the appropriate records of funds, securities, and other properties of a client coming into possession of the lawyer. (RR-14) Specifically, Respondent failed to record the $13,000 amount loaned to her on behalf of Ms. Bush; (RR-14) nor the consultation fees collected on a monthly basis from Ms. Bush from May 1, 1985 through April 2, 1986. (RR-14) Respondent did not maintain records of all the payments made on Ms. Bush's behalf concerning the satisfaction of judgments and mortgages. (RR-14) Further, Respondent did not execute a contract for fees during her representation and handling of the above described foreclosure action. (RR-14)

B. SUPREME COURT CASE NUMBER: 80,714

The following facts of this case are set forth in the Report of Referee and are not contested by The Florida Bar.

At all times relevant to the facts of this case, Respondent was a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of The Florida Supreme Court. (RR-1)

In or about November 1983, Ms. Phyllis Brown-Singletary (hereinafter Ms. Brown) contacted Respondent concerning a discrimination allegation. (RR-15) This allegation concerned discrimination against Ms. Brown regarding her application to the Sheriff's Office and the discriminatory use of agility tests as a prerequisite for hiring employees. (RR-15) Respondent informed Ms. Brown that she had a good case against the City of Jacksonville and Dale Carson, Sheriff, for discrimination on the basis of gender. (RR-15)

Respondent was familiar with the requirements of the agility test and further knew that Ms. Brown began taking steroids in April 1983 and again two months before her agility test. (RR-15) Respondent was aware that the week prior to Ms. Brown's final test, on October 14, 1983, the preliminary results of her agility tests demonstrated that Ms. Brown was not meeting the minimum requirements. (RR-15) Respondent was also cognizant of the fact that Ms. Brown left the test site after failing the first event on the final day of the physical agility test. (RR-16)

On December 8, 1983, Respondent, on behalf of Ms. Brown, filed a Title VII action with the Equal Employment Opportunity Commission (hereinafter EEOC) alleging discriminatory practices of the Sheriff's Office. (RR-16) Respondent was familiar with the requisite procedures that prior to filing a civil action under Title VII of the Civil Rights Act of 1964 (hereinafter Title 7) she had to receive the "right to sue" from the EEOC. (RR-16) Further, Respondent was aware that according to 42

U.S.C., Section 1983 (hereinafter Section 1983) that an element to be proven is that of discriminatory intent and that there was no evidence of discriminatory intent on the part of the City of Jacksonville nor Dale Carson, Sheriff. (RR-16) On February 3, 1984, Respondent was shown a videotape of Ms. Brown's poor performance on the preliminary agility tests given to Sheriff's Office applicants during the week prior to the final test. (RR-17) Although her performance clearly established that the Section 1983 claim was without merit, (Respondent did not advise her client to voluntarily dismiss her claim.) (RR-17)

On February 23, 1984, United States District Court Judge Moore ordered Respondent and opposing counsel to submit a status report. (RR-17) On March 2, 1984, Respondent submitted an amended claim to the EEOC. (RR-17) Subsequently, on March 12, 1984, Respondent filed a joint status report in the Section 1983 case with opposing counsel advising Judge Moore that discovery would take approximately three to six months. (RR-17) On March 23, 1984, the court entered an order requiring discovery to be completed by May 18, 1984, and set a pretrial conference for May 31, 1984 and trial for June 18, 1984. (RR-18)

On April 4, 1984, Respondent filed a further supplement to the EEOC and subsequently, in April, obtained an expert in exercise physiology for the Section 1983 action. (RR-18)

It was not until June 8, 1984, ten days before the scheduled trial date, that Respondent received notice of Ms.

Brown's right to institute a civil action under Title VII of the Civil Rights Act of 1964 against the Office of the Sheriff and City of Jacksonville. (RR-18) On June 12, 1984, Respondent filed a motion to amend the complaint, and a motion for continuance of trial and reinstitution of discovery in the Section 1983 case. (RR-18)

On June 18, 1984, the scheduled trial date, Respondent announced that she was not ready for trial. (RR-18) Respondent filed a new complaint pursuant to Title 42 U.S.C. Section 2000(e), et seq. alleging the same facts as the pending Section 1983 claim. (RR-19) Judge Moore denied Respondent's motion for a continuance of the Section 1983 case and reset the commencement of the trial for June 19, 1984. (RR-19) On June 19, 1984, Respondent announced that she was not ready to proceed and upon her failure to proceed, the defendants moved for an involuntary dismissal pursuant to Federal Rules of Civil Procedure, Rule 41(b). (RR-19) Judge Moore granted this motion for involuntary dismissal. (RR-19) On June 27, 1984, the defendants moved for taxation of attorney's fees and costs against Respondent and her client, Ms. Brown. (RR-19) The sum of $7,680 attorney's fees were $7,680 and the sum of costs was $530.03. (RR-19-20) Judge Moore ruled in favor of the defendants on their Motion for Taxation of Attorney's Fees and Costs. (RR-19) Judge Moore specifically found (as referenced in his order) that Respondent's conduct in continuing to litigate the Section 1983 action after February 3, 1984, when it became clear Respondent's Section 1983 action was without

foundation and constituted bad faith. (RR-20) Judge Moore, further, found that this 1983 action was frivolous and prosecuted in bad faith. (RR-20)

Subsequent to this order, Respondent convinced Ms. Brown to file an appeal regarding the dismissal and taxation of costs. (RR-20) After being advised by her client that she did not have the cash funds to sustain the costs of an appeal, Respondent advised Ms. Brown that she could assist her in mortgaging her home. (RR-20) Respondent set up a mortgage for Ms. Brown through a friend of Respondent's in Jacksonville. (RR-20) Ms. Brown mortgaged her home for $18,000. Ms. Brown paid Respondent $10,000, from these funds, to file an appeal from the dismissal and taxation of costs. (RR-21)

On August 20, 1985, the District Court's decision was affirmed on appeal by the United States Court of Appeals for the Eleventh Circuit. (RR-21)

Respondent did not contribute to the order to pay costs and fees as prescribed by the federal court's order and affirmed on appeal. (RR-21) In fact, on November 26, 1985, Respondent informed Mr. Rohan, an attorney with the Office of General Counsel, that the ordered costs would be paid by Ms. Brown. (RR-21) Ms. Brown had not permitted Respondent to make this representation to Mr. Rohan, nor did she agree to hold Respondent harmless from this judgment and to pay the judgment in its entirety. (RR-21)

Following the Court of Appeals ruling, Respondent failed to return Ms. Brown's phone calls. (RR-21)

SUMMARY OF ARGUMENT

The Florida Bar submits, that in light of the admitted misconduct of Respondent and the aggravating circumstances, the recommendation of the Referee as to discipline is inappropriate. The Florida Bar posits that Respondent's misconduct during her representation of Ms. Lillian Bush is tantamount to the commission of a theft, in that she counseled her client to convey the deed of her home to Respondent and Respondent converted same to herself. Further, Respondent knowingly misrepresented her assets and the value of property used as collateral to obtain a personal loan from Barnett Bank. Finally, Respondent's representation of Ms. Phyllis Brown in a frivolous lawsuit resulted in Respondent receiving in excess of $10,000 in attorney's fees. The culmination of this misconduct coupled with the attendant aggravating factors justifies an increase in discipline to disbarment.

On the other hand, The Florida Bar simultaneously argues that the two mitigating factors found by the Referee are not supported by the evidence. Therefore the findings are clearly erroneous and should not be considered in reducing the imposition of a sanction for this misconduct. Further the mitigation is insufficient to substantially outweigh the aggravating circumstances to justify any reduction. It is therefore the position of The Florida Bar that this Honorable Court impose the sanction of disbarment.

ARGUMENT

ISSUE I

THE RECOMMENDED DISCIPLINE IS INAPPROPRIATE BASED UPON THE FACTUAL BASIS OF THE ADMITTED MISCONDUCT

Respondent was found to have violated six rules of the Code of Professional Responsibility of The Florida Bar while representing her client Ms. Bush, and to have violated seven rules of the Code of Professional Responsibility of The Florida Bar during the representation of Ms. Brown.

The Referee specifically found that Respondent violated Rule 1-102 (A)(4), which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, while representing Ms. Bush. (Supreme Court Case 80,236) (RR-22) During that representation Respondent convinced Ms. Bush to convey by warranty deed the Locksley property that was pending foreclosure, to Respondent. (RR-4) This transaction was done under the guise of satisfying the mortgages and judgments on the property to successfully avoid foreclosure. (RR-5) Further, Respondent misled Ms. Bush when she informed her that she would file an agreement deed which would convey the property back to Ms. Bush. (RR-5) As a consequence of Respondent's advice, Ms. Bush executed a Purchase and Sale Agreement which reflected that the Locksley property was conveyed to Respondent. Respondent filed this

Purchase and Sale Agreement but did not, however, file the Agreement Deed conveying the property back to Ms. Bush as previously represented by Respondent. (RR-9) This conduct constitutes dishonesty, in that, Respondent, in effect, committed larceny. Respondent took without permission and converted to her own use the property, that is, the Locksley property from her client Ms. Bush.

Converting property entrusted to a lawyer from a client is the most egregious of violations. This impropriety is the equivalent to theft of trust funds and the discipline imposed should be its equivalent. The Florida Bar v. Fitzgerald, 541 So. 2d 602 (Fla. 1989) (holding that misappropriating trust funds and betraying interests of a client who was a partner in purchasing trust property violates prohibitions against acts contrary to honesty, justice and good morals compels disbarment.) Theft under these circumstances, that is, within the attorney/client relationship, is more reprehensible because not only was Respondent acting as Ms. Bush's lawyer but she failed to advise her of the obvious conflict of interest and to seek other counsel to advise her regarding whether a business transaction with Respondent was in her best interest. Respondent exploited her position as a trusted professional and friend by deceiving her vulnerable and poor client by stealing her home, utilizing the facade of benevolence. (T-106) In The Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991), The Florida Supreme Court held that disbarment was appropriate due to the gravity and seriousness of the offenses committed by the

attorney coupled with his extensive disciplinary history (five prior offenses). Neely's conduct, similar to Respondent's, involved the obtaining of title to his client's mother's home, without providing any advice to his mother to seek independent counsel, and executing a note and mortgage on that home in favor of a third party. Although Respondent's disciplinary history is not as extensive, her conduct warrants similar discipline, that is, disbarment. Further, in The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989), the sanction of disbarment was imposed due to the cumulative nature of the misconduct including his working under conflict of interest, the intentional misuse of client funds for self-aggrandizement, assertion of frivolous claims, and charging an excessive fee. The scope of Respondent's conduct is similar to Della-Donna's misconduct, in that, she violated similar rules and breached client confidences by dishonesty and deceit. See also The Florida Bar v. Holmes, 503 So. 2d 1244 (Fla. 1987) (in which a lawyer was disbarred for rule violations including engaging in dishonesty and entering into a business transaction with a client. One instance involved the attorney deceptively handling the purchase of a home from his client.) On the other hand, the case of The Florida Bar v. Israel, 327 So. 2d 12 (Fla. 1975), states that the appropriate discipline in a case in which a lawyer advises a client to convey their home to the lawyer who subsequently evicts the client, is deserving of a public reprimand. The Florida Bar takes issue with this precedent and requests that this Honorable Court overrule its

prior decision. This misconduct, as previously stated, is comparable to theft from Respondent's client and should be disciplined as such. Although, the Referee, in the case at bar, recommends an 18 month suspension, it is the position of The Florida Bar and the Board of Governors that disbarment is the appropriate discipline.

Another act committed by Respondent which amounts to conversion involves the taking of "consultation" fees on a monthly basis when in reality no legal advice, work, or consultation was given. Respondent received monies from Ms. Bush amounting to between $30 and $45 per month from May 1, 1985 and April 2, 1986. The total "consultation fee" paid to Respondent is from $360 to $540. Ms. Bush was a desperate and vulnerable client who placed her trust in Respondent, only to be taken advantage of and victimized. Cheating a client of money is no less egregious than stealing money from one's client trust account. Violation of client trust is the most offensive type of misconduct with regard to the legal profession. In The Florida Bar v. Bussey, the Florida Supreme Court found that a situation in which an attorney acting as a fiduciary to a bank and converts funds to his own use is analogous to misconduct committed by an attorney who misappropriates funds from a client. 529 So. 2d 1113 (Fla. 1988) Further, the court stated that misappropriation of client funds is a serious offense. Although the abuse in Bussey involved two million from a Bank, the abuse is no less egregious when a poor client's home is misappropriated by a

lawyer or when an attorney charges an excessive fee for filing frivolous claims on behalf of a middle class client as is the case at bar. Since, as stated in Bussey at 1114, it is not uncommon for this Court to disbar an attorney for misappropriating client trust funds, The Florida Bar requests this sanction be imposed for Respondent's analogous and serious misconduct.

The final act of conversion committed by Respondent occurred when Respondent submitted applications to Barnett Bank for two loans. Respondent misinformed the Bank by utilizing collateral that was fraudulent in two respects. The first is in regard to the properties Respondent used as collateral to obtain the loan. (RR-9) Respondent deceptively listed the Locksley property as her own, regardless of her alleged intention to reconvey the property to Ms. Bush. (RR-9-10) Respondent withheld the information contained in the agreement deed and the accompanying promissory note, which set forth the conditions upon which the property would be conveyed back to Ms. Bush. (RR-7-8) Further, the Purchase and Sale Agreement provided to the loan officer reflected an inflated value of the Locksley property. (RR-9) Respondent knew this value to be a fallacious assertion, in that she constructed the documents to include attorney's fees and money that was never exchanged. The actual value of the property was $29,000, and not $39,000, which was reflected in the Purchase and Sale Agreement. (RR-9) Further, Respondent did not inform the Bank that the $15,000 loan was to be used to repay a private source, that is,

her family member, for a loan taken out to avoid foreclosure of the Locksley property. (RR-10) This is fraudulent because the bank requests truthful information pertaining to all liabilities and assets in order to make a decision concerning the extension of a loan. The bank conferred two loans to Respondent, one loan in the amount of $15,000 and the other in the amount of $56,000. (RR-10) Respondent knowingly omitted this information from her application, thereby perpetrating a fraud in order to obtain a loan.

Respondent's conduct during her representation of Ms. Brown was no less egregious. Her conduct, as found by the Referee, violated rules including but not limited to engaging in conduct prejudicial to the administration of justice and conduct that adversely reflects on her fitness to practice law. (RR-23) On Ms. Brown's behalf, Respondent filed an action alleging a violation of Section 1983 of the Civil Rights Act. (RR-16) Further, Respondent, who has had substantial experience in the practice of law and with civil rights claims, erroneously told Ms. Brown that she had a viable action against the City of Jacksonville and Dale Carson, the Sheriff. In order to prove a Section 1983 claim, the element of intent must be established. Respondent knew there was no evidence of intent on the part of the defendants. (RR-16-17) Respondent subsequently filed this action even though it lacked merit. Further, it became evident that there was no viable claim in February 1984, when Respondent viewed a videotape of her client's poor performance on the agility tests which were the

basis for the claim. (RR-17) Although this case obviously had no foundation, Respondent pursued the action and did not advise her client to dismiss the case for lack of merit. At the time of the scheduled trial, Respondent announced that she was not prepared to proceed and requested a continuance. (RR-18-19) The Honorable Judge Moore denied her motion. (RR-19) Upon this denial and Respondent's inability to go forward, the Counsel for the Defendants moved to dismiss the action and to award the taxation of attorney's fees and costs against Respondent and her client. (RR-19) The Honorable Judge Moore dismissed the action and granted defense counsel's motion to assess attorney's fees and costs against Respondent and her client. (RR-19-20) Judge Moore made specific findings that this action was frivolous and prosecuted in bad faith. (RR-20) The filing and further perseverance of this frivolous claim was conducted not in the best interest of her client but in Respondent's financial interest.

Subsequently, Respondent convinced Ms. Brown to mortgage her home in order to raise the funds needed to appeal Judge Moore's rulings. (RR-20) It is evident that this appeal was unwarranted, meritless, and was merely a tactic to earn more money in attorney's fees from her client. In fact, Respondent assisted Ms. Brown in mortgaging her home in order to pay Respondent's $10,000 fee by introducing her to a friend that was knowledgeable concerning mortgages. This advice from an experienced lawyer was self-serving in that it is obvious that the trial court ruling would be affirmed. In fact, the ruling

was affirmed in a perfunctory opinion by the Circuit Court of Appeals of the Eleventh Circuit on August 20, 1985. (RR-21)

Subsequent to the Appellate Court ruling, Respondent submitted a letter to the General Counsel's office claiming that her client had agreed to satisfy the award of attorney's fees and costs and hold her harmless from the judgment. (RR-21) This was an inaccurate characterization and Ms. Brown did not agree to relieve Respondent from her obligation. (RR-21) Respondent deliberately relinquished her debt to the detriment of her client.

This court has consistently held that the appropriateness of discipline must meet a three prong test. The discipline must be just to the public, fair to the attorney and deter other attorneys from misconduct. The Florida Bar v. Pahules, 23 So. 2d 130 (Fla. 1970). The Florida Bar believes that based upon the aforementioned, an eighteen month suspension as recommended by the Referee falls short of the test in Pahules.

ISSUE II

THE RECOMMENDED DISCIPLINE IS INAPPROPRIATE IN LIGHT OF THE ATTENDANT AGGRAVATING CIRCUMSTANCES

The referee made specific findings in aggravation which concern the admitted misconduct, that include but are not limited to the following: dishonest and selfish motive, vulnerability of the victim, and indifference to making restitution. (RR-25) These findings from the referee are supported by clear and convincing evidence and are further cloaked with the presumption of correctness. Findings of fact of a state bar referee will be upheld unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990).

These findings in aggravation go to the heart of misconduct which impugn the integrity of all lawyers in the eyes of the public. These factors, coupled with the underlying behavior, justify the increase in discipline to disbarment. As in the case of The Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991) which is similar to the case at bar, but for the significant prior discipline, the underlying misconduct justifies the imposition of disbarment. The Florida Supreme Court in Bussey, 529 So. 2d at 1114, stated that misappropriation of funds "is precisely...the conduct that tarnishes the reputation of attorneys in Florida. Respondent...by taking advantage of...positions of trust, ha[s]

engaged in the type of conduct which damages the reputations of attorneys throughout the state." The similarity of Respondent's misconduct in taking advantage of her clients with a selfish and dishonest motive has the same effect and impact on the members of The Florida Bar. The Florida Bar relies upon the attendant aggravating circumstances to support its contention that the increased discipline of disbarment is warranted. The Referee made specific findings regarding aggravating and mitigating circumstances. The aggravating circumstances, as set forth in the Referee's Report, are as follows: prior disciplinary offenses; dishonest or selfish motive; multiple offenses; vulnerability of the victim; substantial experience in the practice of law; and indifference to making restitution. (RR-25)

Respondent was previously disciplined by The Florida Bar when she received a private reprimand in 1989. (T-114-5) According to the Florida Standards for Imposing Lawyer Sanctions Section 9.22(a), prior discipline is to be considered when implementing discipline. Further, consideration of multiple offenses is pertinent when determining the appropriate discipline. Florida Standards for Imposing Lawyer Sanctions Section 9.22(d). According to The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1983); The Florida Bar v. Greensphan, 386 So. 2d 523 (Fla. 1980); and The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979) cumulative misconduct is to be sanctioned in a harsher manner than is isolated incidents of misconduct and even more severely with cumulative misconduct that is similar

in nature. Respondent has been found to be in violation of numerous rules based upon differing acts of misconduct that involve dishonesty and client injury. Specifically, Respondent engaged in dishonesty, collecting an excessive fee, entering into a business transaction with a client in which client and lawyer have differing interests, failing to intentionally seek the lawful objectives of her client, by intentionally prejudicing or damaging a client during representation, failing to maintain records, engaging in conduct that is prejudicial to the administration of justice, engaging in conduct that adversely reflects on his fitness to practice of law, handling a matter in which one is not competent, handling a legal matter without preparation, filing a lawsuit when she knew or it was obvious that such action would serve merely to harass or maliciously injure another, and advancing a claim that is unwarranted under existing law. (RR-23-24) This laundry list of violations constitutes multiple offenses and is the type of misconduct addressed in The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1983). The Florida Standards for Imposing Lawyer Sanctions recommend the following regarding Respondent's misconduct:

> 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.
>
> 4.31 (a) Disbarment is appropriate when a lawyer, without the informed consent of the client engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to

benefit the lawyer or another, and causes serious or potentially serious injury to the client

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Accordingly, the appropriate discipline in this matter would be disbarment. Further, "[b]ar discipline exists primarily to protect the public from misconduct that occurs in the course of an attorney's representation of a client. Standard 3.0 of the Florida Standards for Imposing Lawyer Sanctions states: "In imposing a sanction after a finding of lawyer misconduct, a court shall consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." In light of these factors,"[the court] ha[s] repeatedly found that 'in the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list." In The Florida Bar v. Tunsil 503-1230 (Fla. 1986) as cited by the Florida Supreme Court in The Florida Bar v Helinger, Order No. 79,370 (June 17, 1993).

The most egregious finding is that Respondent acted with a dishonest or selfish motive. In light of this finding it is fair to conclude that Respondent acted in a manner contrary to the interest of her clients and for her own benefit. This is

misconduct that cannot be condoned by The Florida Bar. Further, the following are aggravating circumstances which adversely reflect on members of The Florida Bar: the vulnerability of the victim, Respondent's extensive experience in the practice of law and her total indifference to making restitution. As stated in Bussey at 1114, this misconduct "reflects adversely on the practice of law and does irreparable harm to the public image of attorneys in this state. Indeed the public has been most vocal about this need for protection from dishonest lawyers." Accordingly, the Florida Supreme Court pronounced that it would not hesitate in providing that protection. In both cases at bar, Respondent's clients suffered financially and emotionally. Therefore, The Florida Bar, on behalf of the public, requests that same protection for the public from Respondent by imposition of the sanction of disbarment.

ISSUE III

THE MITIGATION IN THIS CASE IS INSUFFICIENT TO OVERCOME THE GRAVITY OF THE OFFENSES AND AGGRAVATING CIRCUMSTANCES. FURTHER, THE FINDINGS IN MITIGATION THAT RESPONDENT FULLY AND FREELY DISCLOSED INFORMATION TO THE FLORIDA BAR AND THE FINDING OF UNREASONABLE DELAY IN THE DISCIPLINARY PROCEEDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

The mitigating circumstances found by the Referee, that is, personal or emotional problems; full and free disclosure to disciplinary board and unreasonable delay in disciplinary proceeding are insufficient to justify the more lenient sanction of an 18 month suspension from the practice of law. The Florida Bar does not contest that there is evidence to support the finding regarding emotional and personal problems of Respondent. The Florida Bar concedes that this is a factor properly considered by the Referee in mitigation.

On the other hand, there is a total absence in the record of evidence to support that Respondent provided full and free disclosure to the Disciplinary Board. Due to the lack of evidence to support this finding, The Florida Bar's position is that this factor should not have been considered by the Referee in mitigation and therefore is a finding that is clearly erroneous. See The Florida Bar v. Colclough, 561 So. 2d 1147 (Fla. 1990) (requiring a showing that a finding of fact is clearly erroneous or lacking in evidentiary support to be controverted.)

Further, the mitigating factor of delay in the disciplinary proceedings is lacking in evidentiary support and therefore erroneous. The Florida Bar v. Colclough, 561 So. 2d 1147 (Fla. 1990). It is The Florida Bar's contention that the delay in disciplinary proceedings in both cases can be attributed to action and inaction on the part of Respondent.

Regarding the delay in the disciplinary proceedings concerning Supreme Court Case Number 80,236 (involving the representation of Ms. Bush), The Florida Bar contends that any unreasonable delay in the proceedings was perpetuated by Respondent and that to consider it mitigation is clearly erroneous. Although The Florida Bar was made aware of the alleged misconduct in 1987, it was decided that the appropriate course of action was to wait until the civil lawsuit arising from the misconduct was resolved in order to adequately investigate the matter. (T-34) This civil lawsuit was not resolved until June of 1990. (T-34) According to The Florida Bar v. Marks, 492 So. 2d 1327 (Fla. 1986), a delay of two years in The Florida Bar's bringing attorney disciplinary proceedings did not constitute unreasonable delay. In Marks, The Florida Bar delayed disciplinary proceedings until the resolution of a criminal matter which was the impetus for disciplinary action. Therefore, the delay of three years in the case at bar is deemed to be reasonable.

Further, by letter dated February 27, 1990, Respondent confirmed the continuance of the grievance committee hearing

regarding probable cause on this matter scheduled March 9, 1990 at Respondent's request. (T-34)

The matter was left unresolved and on April 9, 1991, The Florida Bar sent correspondence to Respondent regarding this matter and a potential waiver of probable cause by Respondent. (Exhibit attached to Motion to Supplement Record of Referee). On March 27, 1992, The Florida Bar sent a proposed waiver of rule violations to Respondent. (T-36-7) The waiver of probable cause was ultimately filed in April 1992. (T-37)

Considering the request for a continuance by Respondent in February 1990 and the initiation of a waiver of probable cause from Respondent, any subsequent delay was caused by the dilatory manner of Respondent. Therefore, the Referee's finding that delay in the disciplinary proceeding is a mitigating factor is clearly erroneous.

The Florida Bar retained jurisdiction over Supreme Court Case Number 80,714 (the matter involving Ms. Brown) in December of 1989. (T-24) Although the underlying misconduct occurred prior to 1985, it did not come to the attention of The Florida Bar until 1989. Upon receiving information concerning misconduct in December 1989, The Florida Bar began an investigation. (T-25) This investigation concerned activity that occurred pre-1985, therefore a nine month investigation is not unreasonable. Upon completion of our investigation, The Florida Bar forwarded correspondence to Respondent on September 12, 1990, requesting her to respond to the circumstances surrounding the misconduct. (T-25) Respondent did not forward

a response nor request an extension of time in which to respond within the 10 day period provided. (T-25) Subsequently, The Florida Bar sent another letter on October 4, 1990, requesting a response from Respondent concerning the misconduct and permitting her an additional seven days to comply. (T-25) Once again The Florida Bar did not receive correspondence from Respondent within the seven day time period. (T-25) Due to her lack of response, The Florida Bar forwarded the allegations to the Grievance Committee for further investigation on October 18, 1990. (T-25-26) In the interim, The Florida Bar received a cursory response from Respondent dated October 15, 1990. (T-26) Subsequently, The Florida Bar informed Respondent by correspondence dated October 24, 1990 that her case had been forwarded to the grievance committee and that all future correspondence should be directed to that committee. (T-26) It was not until November 20, 1991, that correspondence indicates that Respondent desired to submit a written response in this matter. (T-30) A response was never submitted.

This case remained at the Grievance Committee until 1992 when Respondent filed a waiver of hearing on probable cause. (T-28; exhibit attached to Motion to Supplement Record submitted to Referee) This waiver was forwarded to The Florida Bar on June 22, 1992. (T-32 and exhibit attached to Motion to Supplement Record submitted to Referee)

Subsequent to the filing of the Waiver of Probable Cause, The Florida Bar filed its Complaint on November 3, 1992. The time period that elapsed was three years. According to The

Florida Bar v. Lipman, 497 So. 2d 1165 (Fla. 1986), The Florida Bar has a reasonable time after obtaining jurisdiction to proceed. Further, this case found that delay caused by Respondent be a consideration when determining reasonableness in the delay of the disciplinary proceedings. It is The Florida Bar's contention that this case was handled within a reasonable time period and in a reasonable manner; therefore, the Referee's finding is not supported by the record and is clearly erroneous. Further, the dilatory manner in which Respondent proceeded should not inure to her benefit by considering this factor as mitigation. Finally, Respondent failed to respond to The Florida Bar's initial inquiry regarding the grievance and therefore it is improper to conclude that she provided full and free disclosure to The Florida Bar grievance committee.

It is clear that the aggravating circumstances coupled with the gravity and seriousness of Respondent's misconduct substantially outweigh any mitigation and therefore, the discipline of disbarment is warranted. The recommendation of the Referee of the more lenient sanction of an eighteen month suspension is in error.

CONCLUSION

The recommended discipline by the Referee of a suspension of 18 months from the practice of law is inappropriate. The gravity and seriousness of Respondent's misconduct, the attendant aggravating circumstances and the evidentiary support of only one (1) factor in mitigation justifies the imposition of disbarment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case Nos. 80,236 and 80,714; TFB File Nos. 87-21613-04C and 90-00370-04C has been mailed by certified mail # P230 518 678, return receipt requested, to DIETRA R. H. MICKS, c/o WILLIAM J. SHEPPARD, Counsel for Respondent, at his record Bar address of 215 Washington Street, Jacksonville, Florida 32202-2808, on this 3rd day of August, 1993.

ALISA M. SMITH, Assistant Staff Counsel